IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-586

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,

Petitioner,

—v.—

ARCHIE NATHANIEL BIGGERS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

SHIRLEY FINGERHOOD
RICHARD G. GREEN
1270 Avenue of the Americas
New York, N. Y. 10020
(212) 246-8689

BURT NEUBORNE
New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

MELVIN L. WULF
LAWRENCE G. SAGER
American Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Amicus Curiae

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Interest of *Amici*

The American Civil Liberties Union, through its cooperating attorneys, represents respondent in the case of *Hon. David Ross, et al.* v. *Stephen Radich,* No. 71-1510, petition for certiorari pending before this Court. The question in *Radich* is whether 28 U.S.C. §2244 permits issues which were raised in an appeal from a State Court conviction to this Court, where the Supreme Court affirmed because it was equally divided, to be considered in a subsequent habeas corpus proceeding. That issue was decided affirmatively by the Court of Appeals for the Sixth Cir-

cuit in this case, as well as by the Second Circuit in the *Radich* case. Thus, *Amicus* has a direct interest in this Court's review of that decision herein.*

Question Presented

Whether an equal division of this Court which results in an affirmance of a State Court conviction is an actual adjudication of Federal constitutional issues within the meaning of 28 U.S.C. §2244(c) and therefore a bar to consideration of those issues in a subsequent habeas corpus proceeding.

ARGUMENT

In considering the question with which *Amicus* is concerned the Sixth Circuit stated below that it did not believe "logically or historically a 4-4 division of the United States Supreme Court can be held to represent any federal adjudication of appellant's federal constitutional claims on the merits" (448 F.2d 91, 97).

The decision of Court of Appeals for the Second Circuit in *U. S. ex rel. Radich* v. *Criminal Court of City of New York*, 459 F.2d 745 (1972), certiorari petition pending, is in accord. The Second Circuit reviewed Congressional enactments authorizing Federal courts to entertain writs of habeas corpus and this Court's applicable decisions, and concluded that a state convict is entitled thereby to one adjudication by a federal court of federal constitutional issues. Thus, the Congressional purpose behind §2244(c) was found not to be to deprive the habeas petitioner of his day in federal court but to protect the federal courts

* Consents by the parties to the filing of this *Amicus* brief have been filed with the Court.

against vexatious repetitive petitions seeking to relitigate issues already conclusively decided by a federal tribunal.

Neither the respondent in this case, nor Radich, had the merits of his Federal constitutional claims decided by any Federal Court prior to seeking habeas corpus relief. The equal division of this Court on the appeal from the State judgments merely left the State Court determinations of respondents' claims in effect. To rule that the 4-4 affirmance barred subsequent habeas corpus review by a federal court would give the state determinations final effect in contravention of this Court's rule: "The state conclusions of law may not be given binding weight on habeas." *Townsend* v. *Sain*, 372 U.S. 293, 318 (1963).

The Second Circuit found corroboration for its interpretation of Section 2244(c) in another provision of the Judicial Code, 28 U.S.C. §2109, which reveals that Congress does not deem an *ex necessitate* affirmance by an equally divided Court as an actual adjudication on the merits. Section 2109 provides that when a case on appeal from the judgment of a State court cannot be decided in the Supreme Court because of the absence of a quorum of qualified justices "the court shall enter its order affirming the judgment of the court from which the case was brought for review *with the same effect as upon affirmance by an equally divided court.*" (Emphasis added.) (459 F.2d 745, 750.)

Surely, it cannot be contended that a Supreme Court affirmance in the absence of a quorum could constitute an actual adjudication on the merits within the meaning of Section 2244(c). Since Congress obviously views an affirmance in the absence of a quorum as equivalent to affirmance by an equally divided court, such an affirmance cannot bar subsequent review by habeas corpus.

CONCLUSION

The decision of the Sixth Circuit with respect to this issue should be affirmed.

Respectfully submitted,

SHIRLEY FINGERHOOD
RICHARD G. GREEN
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New York, N. Y. 10020
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